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IN THE

Supreme Court of the United States

October Term, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

The compelling need for reversal of the holding below is best illustrated by the recent decisions of *Goranson v. Capital Airlines, Inc.*, 221 F. Supp. 820 (E. D. Va., April 10, 1963) [1] and *Thompson v. Capital Airlines, Inc.*, 220 F. Supp. 140 (S. D. N. Y. May 1, 1963), both arising out of an aircraft crash at Charles City, Virginia.

In *Goranson* the domiciliary administrator's wrongful death suit had been transferred from the Northern District of Ohio to the Eastern District of Virginia, where other actions arising out of the same accident were pending. On the basis of the opinion of the Court of Appeals in the case at bar the transferee court remanded the action to Ohio since the domiciliary administrator had not applied for appointment in Virginia. The fact that another action for the death of the same decedent brought by a locally qualified administrator was also pending in the Eastern District of Virginia was deemed to be irrelevant (Brief for Respondents, Appendix, pp. 8a, 9a). Accordingly, two separate actions arising out of the same aircraft accident brought on account of the death of the same decedent remain pending in different district courts despite the language and purpose of Section 1404(a).

Cases arising from the same crash must also be tried in New York. In *Thompson v. Capital Airlines, Inc.*, 220 F. Supp. 140 (S. D. N. Y. 1963), the court concluded that three actions arising from the crash should be transferred to the Eastern District of Virginia. However, the court ordered transfer in only the one action in which the plaintiff was qualified under the law of Virginia. The court said that while it might disagree with the ruling of the

1. The decision in *Goranson* is cited at pages 28-31 and reproduced in full at pages 2a-9a of Brief for Respondents.

Court of Appeals in *Barrack v. Van Dusen*, transfer of the other two cases, in which the plaintiffs were not qualified to act in Virginia, would be futile since they would be remanded to New York as was done in *Goranson v. Capital Airlines, Inc., supra* (220 F. Supp. 140, 143).

Because of these two cases alone, separate suits must be maintained in three district courts in spite of the plain economies which would result from transfer and consolidation for efficient and consistent disposition in a single federal court. It is now indisputable that unless the decision below is reversed, needless and wasteful fractionalization of multiple action disaster litigation will result. This unwarranted result has already transpired subsequent to the decision below in the cases arising out of the Charles City, Virginia, crash.

As an alternate ground for affirmance, plaintiffs have advanced the contention that transfer would "gravely prejudice plaintiffs' substantive rights under the law of damages."

This contention is baseless. Two established principles of law each insure that the measure of damages will be the same irrespective of whether the cases are tried in Pennsylvania or Massachusetts.

First, the transferee district is required to apply the law of the transferor district, including its choice-of-law rules, in the trial of a case transferred under 1404(a). *H. L. Green Co., Inc. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico 1959); *Hargrove v. Louisville & N. R. R.*, 153 F. Supp. 681, 684 (W. D. Ky. 1957); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

The second is the rule of Pennsylvania law which would require the application of Massachusetts law if these cases are tried in the Eastern District of Pennsylvania. Under Pennsylvania choice-of-law rules, the law of the

place of injury governs both the cause of action[2] and the measure of damages.[3] The Massachusetts rule limiting recovery therefore would be applied regardless of the district in which these actions are tried.[4]

Pennsylvania courts will apply this rule even in face of plaintiffs' claim that its application would violate Pennsylvania's constitution and public policy and that this rule would not be applied by New York courts. The recent decision of the Court of Common Pleas of Philadelphia County in *Griffith, Executor, etc. v. United Air Lines, Inc.*, C. P. No. 6, June Term, 1962, No. 2013, is squarely in point. This was an action for the death of a resident of Pennsylvania arising from an aircraft accident in Colorado. Colorado law authorizes recovery of either compensatory damages not exceeding $25,000 or punitive damages of not less than $3,000 but not exceeding $10,000. *Colorado Annotated Statutes*, §§ 41-1-1 to 41-1-4. The Pennsylvania court ruled, in rejecting plaintiff's contention, that it is not contrary to the public policy of Pennsylvania to enforce the limitation on damages contained in the Colorado statutes.[5]

The decision of *Bednarowicz v. Vetrone*, 400 Pa. 385 (1960), compels the conclusion that the Supreme Court of Pennsylvania would reach the same result. Plaintiffs,

2. *Maxson v. McElhinney*, 370 Pa. 622 (1952); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9 (1949); *Smith v. Pennsylvania R. R.*, 304 Pa. 294 (1931); *Hoodmacher v. Lehigh Valley R. R.*, 218 Pa. 21 (1907); *Usher v. West Jersey R.R.*, 126 Pa. 206 (1889).

3. *Rodney v. Staman*, 371 Pa. 1 (1952); *Rennekamp v. Blair*, 375 Pa. 620, 621, 622 (1954).

4. Application of the Massachusetts limitation is likewise compelled by the full faith and credit clause. Since Pennsylvania looks exclusively to the Massachusetts Death Act as creating the cause of action, the decisions of this Court teach that the limitations imposed on the cause of action by that Act must be given full faith and credit by Pennsylvania. *First National Bank v. United Air Lines*, 342 U. S. 396, 400-401 (1952); *Order of Travelers v. Wolfe*, 331 U. S. 586 (1947); *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 160 (1932). The Court of Appeals for the Second Circuit has disagreed. *Pearson v. Northeast Airlines Inc.*, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U. S. 912 (1963).

5. This is stated in the court's order sustaining defendant's preliminary objections to the complaint entered on October 7, 1963.

residents of Pennsylvania, were injured in Ontario, Canada, while passengers in an automobile owned and operated by defendant, also a resident of Pennsylvania. The suit was dismissed because under the law of Ontario plaintiffs had no cause of action, although they clearly would have had a cause of action if the accident happened in Pennsylvania. The Supreme Court of Pennsylvania affirmed. It held that the Constitution of Pennsylvania had no extraterritorial force, that plaintiffs' rights were governed by Ontario law, and that Pennsylvania public policy did not require a contrary result. To the contention that plaintiffs' cause of action would be recognized by the courts of Quebec, the Court replied:

> "[O]ur decisions on the question of Conflict of laws are irreconcilable with those recognized by some Canadian Courts and are directly in point and adverse to the plaintiffs." 400 Pa. 385 at 390.

It therefore is plain that respondents' reliance on decisions interpreting the law of New York is misplaced. That state's choice-of-law rule is quite different from that of Pennsylvania. For example, New York courts will apply New York law to create a cause of action for a New York resident who is injured in Ontario, Canada, while a guest in an automobile, even though the plaintiff has no cause of action under the law of Ontario. *Babcock v. Jackson*, 12 N. Y. 2d 473 (1963). Pennsylvania courts will not. *Bednarowicz v. Vetrone*, 400 Pa. 385 (1960). New York courts will not enforce a contractual limitation on recovery against New York residents even when the cause of action arises in a state in which the limitation is enforceable. *Conklin v. Canadian-Colonial Airways*, 266 N. Y. 244, 194 N. E. 692 (1935). Pennsylvania courts will enforce the limitation under these circumstances even though they would not enforce the limitation if the cause of action arose in Pennsylvania. *Hughes v. Pennsylvania Railroad Company*, 202

Pa. 222, 228-229 (1902); *Quaker Worsted Mills Corp. v. Howard Trucking Corp.*, 131 Pa. Super. 1, 8-9 (1938).

Further, the relevant constitutional provisions require one result in New York, but quite a different one in Pennsylvania. The New York Constitution, Article I, § 16, provides that the amount recoverable in a wrongful death action "shall not be subject to *any* statutory limitation" (emphasis supplied).[6] The Pennsylvania Constitution, Article III, § 21 provides that ". . . in no other cases shall the *General Assembly* limit the amount to be recovered for injuries resulting in death . . ." (emphasis supplied).[7] Obviously, the Pennsylvania provision evidences no public policy against the application, under normal choice-of-law rules, of law enacted by other state legislatures. To the contrary, the decisions of the Pennsylvania courts evince a strong policy in favor of enforcing the law of the state in which the cause of action arose. Rule 2207 of the Pennsylvania Rules of Civil Procedure goes so far as to require that the party instituting a wrongful death action be authorized to do so by the law of the jurisdiction in which the cause of action arose.

In *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957), the Court of Appeals for the Third Circuit applied the Pennsylvania choice-of-law rule in specifically holding that a limitation on recovery to a maximum sum of $15,000 under the statute of the place of the injury was correctly applied by the District Court for the Eastern District of

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6. The entire section reads as follows:
"The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

7. As amended on November 2, 1915, this provision authorizes the General Assembly to enact workmen's compensation laws fixing the maximum and minimum limits of recovery. It then provides:
"but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Pennsylvania.[8] Nor does the penal nature of the damages to be assessed under Massachusetts law indicate that Pennsylvania courts would authorize recovery of compensatory damages instead. To the contrary, Pennsylvania courts would dismiss the actions rather than fashion an alternate remedy if, as contended by plaintiffs, Pennsylvania courts would consider the cause of action to be penal in nature.[9] *Nesbitt v. Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank v. Kirk*, 222 Pa. 567 (1909).

The same contention which plaintiffs advance here was also rejected by the Court of Appeals for the Sixth Circuit in *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962). In that case the court declined to issue the writs of mandamus or prohibition against an order transferring an action for the death of an Ohio resident from Ohio to the Eastern District of Virginia where the aircraft crashed, even though Virginia law limits recovery to $30,000 and the Ohio Constitution expressly provides that there should be no limitation in the amount of recovery for wrongful death. The court reasoned that the law of Virginia would be applicable to the cases in any event because the settled law of Ohio would require the district court in Ohio to apply the law of Virginia, the state in which the crash occurred.

Other alternate grounds for affirmance advanced by respondents (Brief for Respondents, pp. 33-40), are clearly matters in the trial court's discretion on which plaintiffs have an opinion differing from that of the district court. It is significant that even the Court of Appeals would not have reviewed the decision of the district court on these

8. See also, *Curtis v. Campbell*, 76 F. 2d 84 (3d Cir. 1935), *cert. denied*, 295 U. S. 737 (1935), in which the court found that the Virginia wrongful death statute containing a limitation on recovery governed the rights of the parties.

9. Counsel for plaintiffs have persisted in describing the Massachusetts wrongful death statute as containing a "punitive restriction on damages." Brief for Respondents, p. 41. It is to be noted that it is the measure of damages which is considered to be penal, not the limitation on recovery. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U. S. 128 (1956).

grounds. *United States v. Wright*, 282 F. 2d 428 (3d Cir. 1960); *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3d Cir. 1952).

CONCLUSION.

The ruling of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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